IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 172.

NORTHERN PACIFIC RAILWAY COMPANY AND THE FARMERS LOAN AND TRUST COMPANY, TRUSTEE, PETITIONERS,

vs.

E. W. McCOMAS.

BRIEF FOR RESPONDENT.

Reduced to its final analysis, the single question in this case, as presented by the writ of certiorari, is as to whether the Supreme Court of the State of Oregon had jurisdiction to consider and adjudicate the questions arising therein.

This question must be determined upon the facts as found by the trial court and the law applicable thereto.

The lands lying in Oregon, it must be presumed that the Oregon courts had jurisdiction, under the general proposition that the several States of the Union possess the power to

regulate the tenure of real property within their respective limits, the modes of its acquisition and transfer, etc. A very learned discussion of this question is contained in the decision of this court, delivered by Mr. Justice Field, in *United States vs. Fox,* 94 U. S., 315, 320, as follows:

> "The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or other mode, is exclusively subject to the government within whose jurisdiction the property is situated. *McCormick vs. Sullivant,* 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created, and would seriously embarrass the landed interests of the State."

The Facts.

The pertinent and essential facts necessary for a correct understanding of the questions involved are contained in paragraphs VI, XI, and XIV of the Findings of Fact, (R. 37, 38) as follows:

VI.

> "That the lands remaining in controversy and involved in this suit are lots 2 and 4 of section 5, and the north half of the northeast quarter, and lots 1 and

2, and the northeast quarter of the southwest quarter of section 7, township 5 north, of range 30 east, W. M."

XI.

"That the plaintiff and his grantors and predecessors in interest have been in the actual possession of the lands in controversy, and each and every part thereof, under a claim of right, title and interest and under color of title thereto, by deeds from the State of Oregon bearing dates, respectively, of August 10, 1892, and of March 15, 1895, claiming and holding the same adversely to the defendants and to all the world for long prior to and ever since the 15th day of March, 1895, and are now so in possession and so holding and claiming the lands in controversy, and each and every part thereof, by color of title as aforesaid."

XIV.

"That on the 31st day of December, 1907, the United States issued its patent to the defendant for lots 1 and 2 of section 7, under the General Granting Act of 1864, for place lands, and on the 9th day of June, 1906, the United States issued its patent to the northeast quarter of the southwest quarter of said section 7 as place lands under the General Granting Act of 1864, and on May 4, 1909, the United States issued to the defendant its patent for lot 2 as place lands under the General Granting Act of 1864, and that the defendant received and accepted such patents from the United States so conveying said lands as lands in the place limits under said grant."

It will be observed from the foregoing that when this suit was brought, on September 25, 1912, four of the five tracts in controversy had been patented to the Northern Pacific Railway Company and that the legal title to those four tracts was then in said company.

The Law Applicable.

The suit was apparently brought under section 516 of Bellringer & Cotton's Compiled Statutes of Oregon, usually cited as "B. & C. Comp.," which provides as follows:

> "Any person claiming an interest or estate in real estate not in the actual possession of another may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests, or estates."

This statute has been under consideration many times in the Supreme Court of the State, and the decisions thereon have been entirely harmonious and uniform. Only a few of them will be referred to.

In *Ladd vs. Mills,* 44 Or., 224, 226, the court, having reference to this statute, said:

> "Under this provision, it is not necessary that the plaintiff have the legal title before he can maintain a suit to determine an adverse claim to real estate. If he has any substantial interest in or claim to the property, and another asserts an estate or interest therein adverse to him, he is entitled to proceed under the statute."

This decision was approved and followed in the following, and many other subsequent cases in that court:

Holmes vs. Walford, 47 Or., 93, 99.

Savage vs. Savage, 51 Or., 169, 170.

Kieffer vs. Victor Land Company, 53 Or., 174, 178; and

Boe vs. Arnold, 54 Or., 52, in which a very thorough and complete discussion of the question was made, and the conclusion reached that—

> "One claiming title to land by adverse possession for a period of 10 years as against all persons, but

> recognizing the superior title of the United States Government, may assert such adverse possession as against any person claiming to be the owner under a prior grant."

As the court points out in its decision in the case last cited, an identical view of similar statutes has been taken by the highest courts of many of the States, citing numerous authorities.

A few additional authorities under like statutes of other States will be cited.

In *Pennie vs. Hildreth,* 81 Cal., 127, 130, under a provision of law quite similar to the Oregon statute, the claim was made that, in order to bring and prosecute a suit to quiet title, the plaintiff must be possessed of the legal title to the land involved, but the court answered that claim, saying:

> "If it be conceded that, in order to maintain an action of this kind, the party must have title in the property, the argument would have much force. But we do not understand this to be the law. * * * It is clearly not necessary that he have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action."

The same rule is applied by the Supreme Court of Iowa.

Laverty vs. Sexton & Son, 41 Iowa, 435.

Iowa Railroad Land Co. vs. Blumer, 206 U. S., 482, which will be more particularly referred to later on in this brief.

A like rule obtains in Arizona.

Ely vs. New Mexico, &c., Railroad Company, 129 U. S., 291, 294, and cases cited.

So also in Nebraska: *Arndt vs. Griggs,* 134 U. S., 316, 319, *et seq.,* in which the opinion was delivered by Mr. Justice Brewer, in the course of which he quoted with approval

from *Castrique vs. Imrie,* L. R., 4 H. L., 414, 419 (Mr. Justice Blackburn), as follows:

> "We think the inquiry is, first, whether the subject-matter was so situated as to be within the lawful control of the State under the authority of which the court sits; and, secondly, whether the sovereign authority of that State has conferred on the court jurisdiction to decide as to the disposition of the thing, and the court has acted within its jurisdiction. If these conditions are fulfilled, its adjudication is conclusive upon all the world."

The law of Nebraska under consideration in the case in 134 U. S., was Sec. 57, Chap. 73, Compiled Statutes, 1885, p. 183, which provided as follows;

> "An action may be brought and prosecuted to a final decree, judgment or order, by any person or persons, whether in actual possession or not, claiming title to real estate, against any person or persons, who claim an adverse interest therein, for the purpose of determining such estate, or interest, and quieting the title to said real estate."

The learned justice, after a luminous discussion of the authorities, among other things said:

> "Section 57, enlarging as it does the class of cases in which relief was formerly afforded by a court of equity in quieting the title to real property, has been sustained by this court, and held applicable to suits in the Federal court. *Holland vs. Challen,* 110 U. S., 15."

Two cases from Kansas are illustrative of the extent of the rule in that State. Many others might be cited, but these two are believed sufficient for present purposes, to wit:

In *Giltenan vs. Lemert,* 13 Kansas, 355, 358, the court said:

> "A party in the quiet, peaceable, and rightful possession of real estate, claiming title thereto, has such an interest therein, although his title may be ever-

so defective, that he may quiet his title and possession as against any adverse claimant whose title is weaker than his, or who has no title at all."

"It is a maxim that the party in possession is presumed to have a valid title." "It is *prima facie* evidence of seisin in fee." "Quiet and exclusive possession of real estate gives the party holding the same a right against any person who cannot establish a title." "This is the general rule, in respect of which there is no exception." Tyler, Ejectment, pp. 70-72.

In *Brenner vs. Bigelow,* 8 Kansas, 332, the same doctrine is announced, and it was further held (335) that

> "In an action to quiet title where it is shown that the plaintiff is in the actual possession of the property in controversy, the defendant cannot defeat the plaintiff's action except by showing a paramount right in himself. He cannot defeat such action by showing a paramount right in some other person, even if such other person should be a co-defendant."

Coming back now to the case of *Iowa Railroad Land Co. vs. Blumer,* 206 U. S., 482, the opinion in which was delivered by Mr. Justice Day, it will be noted that that case is very much like the one at bar, the third paragraph of the syllabus being as follows:

> "Although one who in good faith enters and occupies lands within the place limits of a railway grant *in præsenti* may not obtain any adverse title against the government, if, as in this case, his possession is open, notorious, continuous and adverse, it may, if the railway company fails to assert its rights, ripen into full title as against the latter, notwithstanding the entry in the Land Office was cancelled without notice as having been improperly made and allowed."

In that case one John Carraher had made an application to make a timber culture entry upon a tract of land within the place limits of the grant to the State of Iowa under the act of Congress of May 15, 1856, for railroad pur-

poses, and his application had been denied by the Commissioner of the General Land Office and the Secretary of the Interior; but pending final decisions on that application, he had made a subsequent application under the same law which was allowed by the local land officers. That entry was also cancelled by the Secretary of the Interior in his decision rejecting the prior application, but Carraher never received notice of such cancellation, and, under advice of his attorney, had remained on the land and had fully complied with the timber culture law for a period sufficient to entitle him to a patent, provided the land had been subject to such an entry. Carraher died, and his successor in interest, one Blumer, brought suit in the proper Iowa court to have title to the tract in controversy quieted in him as against the Iowa Railroad Land Company, as successor in interest of the Dubuque & Pacific Railroad Company, to whom the State had conferred the benefits arising under said grant to it of May 15, 1856. Blumer prevailed in the Iowa courts, and, on error, this court also sustained his claim. In the opinion (pp. 495-496), Mr. Justice Day said:

> "The Supreme Court of Iowa held that there was nothing in these facts to show that Carraher was not acting in good faith and with the belief that he would acquire title under the last entry under the Timber Culture Act, and we are not prepared to disturb this holding.
>
> "After 1891, as we have seen, the railway company was in position to have ousted him from the premises and asserted its superior title and right. It did not attempt to do this, and so far as the record discloses made no objections to Carraher planting and cultivating the trees required by the act of Congress to perfect his title under the second application. His possession was certainly open, notorious, continuous and adverse, and unless he was acting in bad faith, was such as would ripen into full title as against the railway company, it failing to assert its rights within the period of the Statute of Limitations. While until the time had run required by the Timber Culture

> Act, Carraher would have been in no position to claim title as against the government, he was occupying a hostile attitude toward the railway company, and, while recognizing title in the United States, he expected to acquire title from it, had excluded all others from the use and occupation of the land and held under no other title. The Supreme Court of Iowa has held that under such circumstances the statute of limitations of Iowa would run in his favor as against the railroad company, and we find no reason to disturb that conclusion. And for more than ten years that company was in such position under its grant that it might have maintained an action in ejectment, and asserted its title to the premises as against Carraher."

The particular pertinence of the decision just referred to to this case is, that therein it was expressly held that under the Iowa law, an action would lie to quiet title in a plaintiff who did not have any legal title, no title at all, in fact, save that of possession, and that the paramount title to the land in controversy was in the United States, from whom the plaintiff expected to secure a title. In the case at bar, the plaintiff, while not having a legal title to the lands in controversy, as he supposed he had, nevertheless, did have a deed or deeds for the property from the State of Oregon which was claiming the land as having inured to it under the swamp land grant of 1850 and 1860. He and his predecessor from whom he purchased had been in the open, notorious, exclusive and adverse possession of the land, as the findings show, ever since the 15th day of March, 1895, something over 17 years, when the suit was brought. While, of course, he was not expressly claiming a right under any of the public land laws of the United States, he was, nevertheless, claiming the land, was in complete and exclusive possession of it, and necessarily, had it ever been determined judicially that his title under the deeds from the State of Oregon would fail, he would doubtless then follow up his rights to the land and secure title from the United

States under any of the public land laws that might be applicable.

The same principles were applied by this court, speaking by Mr. Chief Justice White, in *Missouri Valley Land Co. vs. Wiese,* 208 U. S., 234, 249. In that case the land in controversy had been granted to the Sioux City and Pacific Railroad Company, the predecessor of the appellant, defendant below, under the acts of Congress of July 1, 1862, and July 2, 1864, being within the place limits of said grants, and was, after certain proceedings in the land department not necessary to be here mentioned, patented to the company. The Union Pacific Railroad Company, claiming to be the owner of the land in controversy, under its grant made by the same acts of Congress, sold the land to one Japp, and in 1887, conveyed it to him by warranty deed, who subsequently conveyed it to the defendant in error, Wiese. It having been determined in the land department that the land never was the property of the Union Pacific Company, but belonged to the Sioux City and Pacific Company, it was held that the sale of the land to Japp by the former company was of no effect, and that, therefore, he was not entitled to the benefits of section 5 of the act of March 3, 1887, as a purchaser from said company. Japp and his successor, Weise, however, remained on the land, and the suit was brought by him to quiet his title thereto. It was held, among other things, that the title of the railroad company became complete upon filing its map of definite location, prior to 1870 (the exact date not being stated in the opinion); and that Wiese could maintain a suit to quiet his title under the laws of Nebraska where the land was situated. In passing upon the question, the Chief Justice said:

> "That the entry and holding of the land by Japp, the grantor of Wiese, under the purchase by Japp in 1882, and the continued possession by Wiese after he acquired the land from Japp, should be deemed to have been adverse to the title and possession of the

> Sioux City Company, if the possession by Japp was not that of a co-tenant, and such possession was unaffected by the proceedings had in the land office subsequent to 1882, is not questioned. We are clearly of opinion that the possession of Japp and his grantee was adverse in the strictest sense of the term, and the acts of Wiese in seeking to acquire title from the United States under the act of 1887, with the view of removing a cloud upon his title, was not an act of recognition or acknowledgement of a superior title, either in the United States or in the Sioux City Company, operating to interrupt the continuity of his adverse possession, and in any event cannot be held to have destroyed a title which had already become perfect by the expiration of the statutory period in Nebraska for acquiring the legal title to land by adverse possession."

For the foregoing reasons, and in the light of the authorities referred to, there can be no valid claim that the suit as originally brought was not in proper form and was not legal under the laws of Oregon, especially as to four of the five tracts in controversy, to which the Northern Pacific Company then had the legal title by patents; and that, especially as to one of the tracts, which, after reconveyance to the United States, had been again patented to the company, when the decree below was rendered, the action would lie.

The contention of petitioner that the adverse possession of McComas, which began in 1895, would not run against the company, which did not receive patents for the land until June 8, 1906, December 31, 1907, and May 4, 1909, respectively, periods less than ten years in extent prior to the bringing of this action, on September 25, 1912, is without force, and is answered by the decision of this court in *Iowa Railroad Land Company vs. Blumer,* 206 U. S., 482, 492-493, in the following language:

> "But when the grant is *in præsenti*, and nothing remains to be done for the administration of the grant in the Land Department, and the conditions of the

> grant have been complied with and the grant fully earned, as in this case, notwithstanding the want of final certification and the issue of the patent, the railroad company had such title as would enable it to maintain ejectment against one wrongfully on the land, and title by prescription would run against it in favor of one in adverse possession under color of title. *Salt Co. vs. Tarpey,* 142 U. S., 241, and *Toltec Ranch Company vs. Cook,* 191 U. S., 532."

This ruling was expressly affirmed by the court in *Missouri Valley Land Company vs. Wiese, supra* (p. 245).

In other words, prescription will run against a railroad grant from the date of filing the map of definite location, even if no patent to the land may have issued from the United States.

The title which the company claimed when said patents were issued to it was that the lands patented were place lands under the granting act of 1864, and its then claim was that its right to the land attached upon the definite location of the road, on June 29, 1883, more than 29 years before the bringing of this action. Consequently, during any portion of that time subsequently to the purchase of the lands from the State and the State's deeds to the same, and the occupancy of the purchaser and his successor, beginning in 1892 and 1895, the company, under the decisions just cited, might have brought an action of ejectment against said purchaser and occupant, and hence, the adverse period of occupancy for ten years, as required by the Oregon law, had more than expired when the suit was brought, and no objection thereto can be effective on that point.

Company Could Not Defeat the Action by Conveying the Lands During Its Pendency.

Nor, under the doctrine of *lis pendens,* could the company defeat the action, during its pendency, by conveying away the lands involved therein. Ever since the decision of Chancellor Kent in the leading case of *Murray vs. Ballou,*

1 Johns, Ch. (N. Y.), 566, the law of this country has been settled that when a court acquires jurisdiction of the defendant and of the *res*, its jurisdiction cannot be ousted and the suit abated by a sale of the *res* by the defendant, and that any subsequent transferee takes with full notice of the suit and will be bound accordingly by any judgment of the court in the original suit.

In *Tilton vs. Cofield*, 93 U. S., 163, 168, the court said:

> "There is another objection to the case of the appellees, which must not be overlooked. They are not subsequent attaching creditors, nor creditors at all; they are purchasers *lite pendente*. The law is, that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset. *Inloe's Lessee vs. Harvey*, 11 Md., 524; *Salisbury vs. Benton*, 7 Lans., 352; *Harrington vs. Slade*, 19 Barb. S. C., 162; 1 Story's Eq., sect. 406. The appellees voluntarily took the position they occupy. They chose to buy a large amount of property, including that in controversy, from the fugitive debtor. This was done after the latter had been seized under the writ of attachment, and while the suit in which it was issued was still pending. They took the title subject to the contingencies of the amendments that were made, and of everything else, not *coram non judice*, the court might see fit to do in the case. The attachment might be discharged, or the judgment might be larger than was then anticipated. They took the chances and must abide the result. Having obtruded themselves upon the property attached, they insist that their purchase narrowed the rights of the plaintiffs and circumscribed the jurisdiction of the court. Such is not the law. After their purchase, the court, the parties, and the *res*, stood in all respects as they stood before; and the judgment, sale, and conveyance have exactly the same effect as if the appellees and the facts upon which they rely had no existence."

In *Hargrove vs. Cherokee Nation,* 129 Fed., 186, 190, the court said:

> "It is a general rule of law, and one which is absolutely essential to the effective prosecution of an action for the recovery of the possession of real property or to enforce a lien against the same, that one who acquires possession of property from a person against whom a suit is at the time pending for the possession thereof or to enforce a lien against the same takes it subject to the outcome of the pending action, and may be dispossessed precisely as the person from whom he acquired the possession might have been dispossessed had he retained the possession, whether such intruder is made a party to the suit and has his day in court or not. Any other rule would render suits for the recovery of real property ineffectual, as they might be defeated by repeated transfers of possession during the pendency of the action." Citing *Tilton vs. Cofield,* 93 U. S., 163, 168; *Whiteside vs. Haselton,* 110 U. S., 296, 301, and many other authorities.

Whether this doctrine of *lis pendens* can be invoked against the United States, to whom the company conveyed the lands after the suit was brought, need not, for present purposes, be considered. The point is, that the company *could not take advantage of such transfer* in order to defeat the suit, especially if, as intimated by the courts below, such transfer and conveyance was for that *very purpose.* It might very properly be held that the United States, under such conveyance, would take the property, if at all, subject to whatever judgment the court might render in the pending suit. This would be in accordance with the well-settled principle that "if the defendant aliens after the pendency of the writ, the judgment in the real action will overreach such alienation." *Murray vs. Ballou, supra.* Otherwise, a great avenue of fraud would be opened up, which the courts would refuse to sanction. And, under such principle, the court below was

correct in saying that there was nothing in the record to show that the conveyance of the lands to the United States had been accepted.

The Company's Pending Selections Invalid and Illegal.

The right of a railroad company acquired by selection is dependent upon the status of the selected tracts at date of selection.

Ryan vs. Railroad Company, 99 U. S., 382.

If at that time appropriated of record, such tracts are not subject to indemnity selection, and such selection should be rejected.

Missouri, Kansas and Texas Ry. Co. vs. Beal, 10 L. D., 504.

Hensley vs. Missouri, Kansas and Texas Ry. Co., 12 L. D., 19.

Bright vs. Northern Pacific R. R. Co., 6 L. D., 613.

Hastings & Dak. Ry. Co. vs. St. P., M. & M. Ry. Co., 13 L. D., 535.

Northern Pacific R. R. Co. vs. Loomis et al., 21 L. D., 395.

Southern Pacific R. R. Co. vs. McKinley, 22 L. D., 493.

Clancy et al. vs. Hastings & Dakota Ry. Co., 17 L. D., 592.

And a railroad company is not entitled to have its indemnity selection suspended to await the determination of the question whether the appropriation existent at date of selection is valid.

Northern Pacific R. R. Co. vs. Smith et al., 31 L. D., 151.

See also *United States vs. Southern Pacific R. R. Co.*, 223 U. S., 565, 570, in which the court, speaking through Mr. Justice Holmes, said:

> "An indemnity grant like the residuary clause in a will contemplates the uncertain, and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may select when its right to indemnity is determined, depends on the state of the lands selected *at the moment of choice.*"

No doubt, having these principles in mind, it was held by Mr. Attorney General Wickersham, in *Northern Pacific Land-Grant—Indemnity Selections*, 29 Op. A. G., 498, rendered July 24, 1912, that the company—

> "May select as indemnity lands within the primary limits which, at the time the grant attached were 'reserved, sold, granted or otherwise appropriated,' *but which have since been relieved of that impediment and at the time of the selection are unoccupied or unappropriated lands.*" (Emphasis mine.)

The pending selections of the Northern Pacific Railroad Company of the lands in controversy were apparently made under authority of this ruling, but the record shows that at the date of tender of said selections the lands were included in a swamp-land selection of the State of Oregon, which remained of record in the Land Department and uncanceled. It also shows that the respondent and his grantors had been in possession of said selected tracts, which had been improved and cultivated for many years prior to and since said selections under claim and color of title derived through purchase from the State of Oregon under its said swamp-land claim. (Finding XI, *supra.*)

By reason of the adversary rights so initiated and gained the company's indemnity selections were invalid, both because of the pending swamp-land selection, and also because

of the fact that for many years the tracts had been adversely possessed, improved, and held by the respondent and his grantors under color of title, lands so held not being subject to selection. The tracts were obviously not "unappropriated" and "unoccupied" at date of selection, but the reverse, and so the selection did not conform to the requirements of the Attorney General's said opinion, and conferred no rights upon the selector.

These selections of the petitioner being invalid and illegal, as shown by the record and the authorities thereon, furnish all the more a good and sufficient reason why the petitioner is in no position to object to the jurisdiction of the Oregon courts in the instant case; and shows all the more conclusively that the title and claim of respondent is good as against said petitioner.

It must be remembered that the main object of this suit is to rid respondent's title and claim of whatever adverse claim the petitioner may have to the lands. What further, if anything, relator may be required to do and perform in order to get a full and complete title to the lands from the Government of the United States does not enter into the case at this time. It will be time enough to enter into that question when the petitioner's claim is out of the way. This suit is for the purpose of quieting title in the respondent, *as against the petitioner;* and there can be no possible doubt, under the authorities cited, that the Oregon courts had jurisdiction to consider and adjudicate that question.

Conclusion.

It results from the foregoing that the Oregon courts had complete jurisdiction of this suit; that, even though the paramount title to most of the lands be now in the United States, yet the jurisdiction of those courts extended to quieting the title in the respondent as against the petitioner in respect of all the land involved, and particularly to that tract which had been selected by petitioner and patented to it on May 25, 1914, to wit: the N. E. ¼ of S. W. ¼ of section 7, township 5 north, range 30 east, as to which the United States at the date of the decree had no title at all, having parted with its title by the issue of said patent; and that the decree below should be affirmed.

Respectfully submitted,

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